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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE BRIAN HERRERA,

Defendant and Appellant.

B211184

(Los Angeles County
Super. Ct. No. BA335289)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Barbara R. Johnson, Judge. Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found Jesse Brian Herrera guilty of the robbery of Manuel Aguilar (count 1) and the attempted robberies of Francisco Pineda and David Dominguez (counts 5 and 6). Herrera was acquitted of one count of robbery (count 2) and one count of attempted robbery (count 3). The trial court sentenced him to a total of five years and four months in state prison and ordered restitution and court fees.

FACTS AND DISCUSSION¹

On January 20, 2008 at approximately 11:00 p.m., Pineda and Dominguez were walking to a friend's house when they saw two men in the area. As they approached the corner of Soto and Saratoga streets, one of the men came out from behind a tree, stopped them, asked if they were in a gang, and demanded their money. Pineda and Dominguez responded that they had no money and attempted to walk away. When Pineda turned around, the man punched him twice in the right eye with his fist. He then followed Dominguez and punched him, throwing him on the sidewalk. Dominguez attempted to get up, but the man kept pushing him down. The man asked Dominguez again if he had any money and he said he did not. The two men ran off. In a photographic lineup and also at trial, Dominguez identified Herrera as the man who struck him and Pineda.

At about 11:30 p.m. on that same evening, Aguilar was riding his bicycle in the area of Saratoga and Fourth streets when Mark Vincent Torres and Herrera approached him. Herrera hit Aguilar in the stomach and threatened to kill him if he did not give him everything he had. Herrera took Aguilar's fanny pack and his cell phone. When Aguilar let go of his bicycle, Herrera took it, and threatened to hit Aguilar with a bottle of Jagermeister that he had taken from Aguilar. Herrera and Torres left and entered a house on the corner and Aguilar followed them. Aguilar began to yell for help. Herrera came out of the house and threw Aguilar's bicycle on the ground. When Aguilar asked for his possessions back, Herrera told him to leave and threatened to kill him.

¹ Only the facts of the three counts for which Herrera was convicted are presented here.

After the neighbors called the police, Officer Yolanda Flores and her partner, Officer Ledesma, arrived and met with Aguilar. Aguilar pointed out Herrera as one of the two individuals who robbed him, and stated that the other person was inside the house. Aguilar told the police what possessions were taken from him and stated that Herrera had threatened to kill him. Upon entering the house on the corner, the police found Aguilar's possessions and observed Torres lying on a bed in a bedroom. Herrera was arrested as he was coming out from the neighbor's yard.

On June 20, 2008, a jury trial began with Herrera and Torres as co-defendants. The trial court then declared a mistrial as to Torres based on his counsel's conflict, and the trial continued as to Herrera alone. The prosecution presented the evidence establishing the facts summarized above. On June 30, 2008, the jury found Herrera guilty on count 1, the second degree robbery of Aguilar, and counts 5 and 6, the attempted robberies of Pineda and Dominguez. He was sentenced to a total of five years and four months in state prison and was ordered to pay restitution and court fees.

Herrera filed a timely appeal. On April 23, 2009, Herrera's appointed counsel submitted an opening brief which raised no issues. Herrera was notified that he could submit within 30 days any ground of appeal, argument or contention which he wished us to consider. On May 20, 2009, Herrera filed a written response arguing the people's witness, Arturo Aguilar, was not credible.

We reject Herrera's argument because it was in the exclusive province of the jury to determine his credibility; we see nothing in the record which rendered his testimony inherently improbable or physically impossible. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [the court "must accord due deference to the trier of fact and not substitute [its] evaluation of a witness's credibility for that of the fact finder"]; *People v. Rabaneles* (2008) 168 Cal.App.4th 494, 509-510.)

We have independently reviewed the record, and are satisfied that Herrera's appointed counsel has fulfilled her duty, and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436; *People v. Kelly* (2006) 40 Cal.4th 106.)

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.